Filed 3/8/19 Miranda v. Alford CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| ELISABETH MIRANDA et. al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>THERESA ALFORD, Individually and as Trustee, etc.,<br><br>Defendant and Appellant. | G054897 consol. w/G055167<br><br>(Super. Ct. No. 30-2014-00749848)<br><br>O P I N I O N |

Appeal from a judgment and post-judgment orders of the Superior Court of Orange County, Jamoa A. Moberly and Gerald G. Johnston, Judges. Reversed. Motion to dismiss appeal denied.

Law Office of Rodney W. Wickers, Rodney W. Wickers, Christina M. Wickers and Alexandra L. Admans for Plaintiffs and Respondents.

Ferguson Case Orr Paterson, Wendy C. Lascher, John A. Hribar; Law Offices of Steven R. Young and Steven R. Young for Defendant and Appellant.

* * *

James Alford passed away in August 2014, after suffering from an aggressive form of brain cancer. His wife of eight years, Theresa Alford, and his adult daughters, Elizabeth Miranda and Patricia Gauvin, have been engaged in litigation over his estate ever since. Our record suggests they may have collectively incurred as much as $1 million in attorney fees through the end of the May 2016 trial. The intensity of the litigation does not seem to have abated in the wake of trial and, unfortunately, our resolution of the issues before us will not bring it to a close.

The trial court concluded that Theresa[1] induced James to sign various documents, including an updated will and trust giving her one-third of his estate, by exercising undue influence over him at a time he was suffering from diminished mental capacity. Somewhat inconsistently, the court also found that Theresa was a loving wife who had not acted in bath faith, and that James probably did want to "take care" of her following his death.

The court initially concluded that the contested documents were invalid on the ground James lacked sufficient mental capacity at the time he signed them. The court later retreated from that finding after Theresa's counsel pointed out that since it had granted partial judgment in her favor on that issue at the close of Miranda and Gauvin's case, she had neither the occasion nor the opportunity to present all of her available evidence regarding that claim.

Theresa appeals from the trial court's judgment, arguing the court erred by relying upon an inapplicable statutory presumption that shifted the burden of proof to her

[1] Because Theresa and James shared the same last name, we refer to them by their first names for the sake of clarity. No disrespect is intended.

on the issue of undue influence, and also that the evidence is insufficient to support either a presumption of undue influence against her or any finding against her on that ultimate issue.[2] Theresa also contends the court's decision is overly broad, and that the court erred by awarding attorney fees and costs to Miranda and Gauvin.

For their part, Miranda and Gauvin have moved to dismiss Theresa's appeal based on the appellate disentitlement doctrine, arguing that Theresa's failure to comply with (1) a pretrial order barring her from using trust assets to pay her attorneys and (2) a provision in the judgment requiring her to produce an accounting in the wake of the judgment, should preclude her from seeking relief from the judgment in this court. For reasons discussed below, we deny that motion.

The appellate disentitlement doctrine is not intended to punish a litigant for past misconduct; it is designed to induce compliance with trial court orders when the trial court itself has been stymied. In this case, there is no evidence the trial court ever ruled that Theresa's withdrawal of funds from an account in her own name violated its prior order regarding her use of trust assets. We will not make such a determination on appeal in the first instance. And as Miranda and Gauvin acknowledge in their motion, Theresa ultimately did produce an accounting by the trial court's final deadline, a few days before they filed their motion to dismiss the appeal. Such compliance with the trial court's mandate leaves nothing to be induced through application of the appellate disentitlement doctrine.

---

[2] Theresa's notice of appeal from the judgment states she is also appealing from the order denying her motion for new trial. However, her opening brief contains no distinct arguments challenging the denial of her new trial motion, and we consequently do not address it separately. Theresa also filed a separate appeal from post-trial orders awarding attorney fees and costs to Miranda and Gauvin. As we explain, those orders fall with the judgment and thus must be reconsidered, if at all, following remand and further proceedings in the trial court.

Next, we conclude the judgment cannot be sustained on the basis of undue influence, and thus must be reversed. It appears the trial court applied the correct common law undue influence presumption, rather than the statutory one, but the evidence was insufficient to support that presumption and the trial court erred by shifting the burden to Theresa to rebut it. The trial court's finding of undue influence therefore cannot be sustained, and the case must be remanded to the trial court for a new trial on that issue.

In the interests of justice, we also direct the trial court to conduct a new trial on Miranda and Gauvin's claim that James lacked sufficient mental capacity at the time he executed the challenged documents. The record suggests that whatever decision the trial court may have reached on that issue at the conclusion of Miranda and Gauvin's case-in-chief, it was persuaded by the end of trial that James lacked sufficient mental capacity to understand the challenged documents when he executed them. Indeed, the court's tentative statement of decision indicates that James's perceived lack of capacity may have been the primary reason for its ruling in favor of Miranda and Gauvin. The trial court later retreated from that finding apparently because Theresa pointed out—correctly—that the court's mid-trial ruling in her favor on that issue effectively deprived her of an opportunity to offer a defense to that claim. It appears to us the trial court did not want to trigger a retrial and so it revised its finding on this issue. There is no indication the trial court actually re-evaluated *the substance* of its finding.

## FACTS[3]

James was "an independent man who had a strong, loving relationship with both [Miranda and Gauvin], who were minors when their mother died. Both [Miranda and Gauvin] moved to Oklahoma as married adults and both had children."

James married Theresa in 2006. At the time of their marriage, both James and Theresa were employed, and they moved into her home in Brea. They continued to maintain separate financial accounts, but shared expenses, including the ongoing expense of the Brea home.

In 2009, three years into the marriage, James created a revocable trust through LegalZoom. The trust designated James as both its trustee and sole beneficiary during his lifetime, and provided that upon his death, most of his assets would be split equally between his two daughters, Miranda and Gauvin. James named his brother, Daniel Alford, as his successor trustee and "told his brother of the creation of the trust, its terms and appointment of his brother as trustee around the time of its creation. James told Daniel that [he] had told Theresa of the terms and that she was not happy about it."

There was no change in James's relationship with either his brother or his daughters between the creation of his 2009 trust and his death, and there was no evidence to suggest he had changed his intentions with regard to any of them.

Following James's retirement in 2011, he "spent more time apart from Theresa." James visited his daughters in Oklahoma for extended periods of time, and when in California, he often "stay[ed] at the residence he inherited from his deceased wife in Oceanside on weekdays[,] partially to avoid Theresa's adult son who was living at the Brea home." Despite their marital distance, however, James and Theresa had no

---

[3] These facts are taken primarily from the trial court's statement of decision, and were not disputed. Quoted factual statements are included in the statement of decision.

intention of separating or divorcing, and James viewed the Oceanside home as merely "a personal retreat" which he "intended to fix up." In July 2013, after James suffered a stroke, he continued to stay at the Oceanside property.

Things changed in December 2013 when James, who had been exhibiting mental confusion, was diagnosed with terminal brain cancer. As the trial court noted in its statement of decision, James's treating neurosurgeon testified "persuasively and unrebutted that James had diminished capacity from December 10, 2013," and that a "[s]urgery to de-bulk the tumor did not improve his capacity." Rather, James's "capacity continued to diminish"

Moreover, as the trial court stated, the neurosurgeon opined that James "did not have capacity to execute documents such as powers of attorney with complete understanding after December 10, 2013," although he did have "sufficient capacity to sign an advance heath care directive if a social worker explained it to him as of January 6, 2014. In [the neurosurgeon's] opinion [James] did not have sufficient concentration to balance a checkbook or make legal decisions."

The neurosurgeon's opinion was corroborated by Miranda and Gauvin's expert witness, who "testified credibly and uncontroverted that in his expert opinion . . . [,] James did not have capacity to make decisions after December 10, 2013[,] beyond those of personal need of the moment." In the psychiatrist's expert opinion, James "would not be able to manage his finances."

Following his surgery, James was discharged from the hospital to an assisted living facility called "Sam's Homecare" at a cost of about $5,300 per month. Up until that point, Theresa never had access to James's bank accounts, but the additional expense of his residential care required that she gain access to his funds because, as the court explained, "James was not in a mental state to manage his finances after discharge from the hospital." At the same time, however, the court found that "James had sufficient capacity to consent to Theresa accessing his funds to pay for his care and any other

reasonable ongoing expenses." As the court noted, "[t]here was no credible evidence that [James] expected to harm her financially by virtue of his illness. Her obtaining access to his general accounts does not appear to be inappropriate or improper under the circumstances."

Theresa contacted Steven Jaksch, James's account representative at Charles Schwab, and informed him of James's brain cancer. Jaksch "recommended to Theresa they get James' affairs in order." Jaksch then called James and set up a meeting, as it was his custom when he learned of a client's final illness "to ask the client whether they have their beneficiaries up to date, trust in order[,] and all powers of attorney in order." Jaksch did not believe he deviated from that practice here.

When Jaksch met with James in early 2014, James applied to open two new IRA accounts with a professional manager, which was a deviation from his prior history as an active and aggressive day-trader of his own investment accounts. James did not indicate he wanted to change the beneficiaries he had designated in earlier retirement accounts, so the beneficiaries of those new accounts were the same—Miranda and Gauvin. According to the trial court, Jaksch's view of James's mental capacity was "consistent with the testimony of the medical experts." Jaksch believed James's relinquishment of control over his investments and his willingness to share financial control with Theresa showed a significant change in his mental acuity and concentration.

Theresa also located James's 2009 will and trust and contacted a probate attorney, Evelyn Leathers, who came to Sam's Homecare on or about February 27, 2014, to meet with James. Leathers testified that although it was Theresa who initially contacted her—and Leathers later represented Theresa in her capacity as trustee of James's trust—James was Leathers' sole client for purposes of reviewing and revising his estate documents.

Theresa was present at the beginning of Leathers' initial meeting with James, but left after about five minutes so Leathers could talk to him in private. Leathers and James discussed his existing will and trust created in 2009, because he wanted "to make sure they did what he wanted them to do and that they were good." According to Leathers, the two of them also discussed James's existing assets, and James directed that Theresa "be in charge of making sure that his estate was handled properly." They did not go into beneficiary designations during that first meeting because James "was getting tired."

Leathers' second meeting with James was four days later, and she testified that at that meeting they discussed how James wanted to dispose of his assets. Theresa was again not present. James told her that he wanted to include Theresa as a beneficiary of his trust, explaining that he wanted to ensure Theresa would be able to live in her house for the rest of her life and be comfortable. According to Leathers, they specifically discussed the fact that leaving a portion of his estate to Theresa would reduce the amount he was leaving to his daughters, and James said he understood that. He also asked Leathers to prepare change of beneficiary documents for his IRA accounts, after she explained to him there would be adverse tax consequences if those accounts were included in his trust. Those new beneficiary designations made Theresa a beneficiary of the IRA accounts along with Miranda and Gauvin. Leathers testified that James told her several times, over the course of their meetings, that he "wanted to take care of" Theresa, and she felt this was just as important to him as taking care of his daughters.

On March 11, 2014, Theresa met with James for the last time, bringing with her all the new estate plan documents. She testified that they went over the documents together, and she explained them to him. Among those documents was a "Restated Declaration of Trust," which significantly revised the terms of James's 2009 trust. The restated trust named Theresa as the trustee, commencing immediately, and included her

as a beneficiary of one third of the trust assets following James's death.[4] Leathers also assisted with documents vesting Theresa with James's power of attorney, and that power was subsequently relied upon to allow Theresa to execute deeds on James's behalf.[5]

Leathers acknowledged that James was cognitively impaired by the time she met him in March 2014. She nonetheless viewed him as intelligent and sophisticated about his financial affairs, and did not believe him to be especially vulnerable to undue influence. She also testified that she never discussed James's estate plan with Theresa, and that Theresa was never present when Leathers discussed it with James.

James died in August 2014. In October 2014, Theresa filed a petition for an order confirming the validity of the restated trust and also that the Oceanside property was properly within the trust. Miranda and Gauvin filed objections to Theresa's petition, alleging the restated trust and will should be declared invalid on the grounds that (1) James lacked capacity to understand them at the time he signed them, and (2) they were procured by Theresa's undue influence.

---

[4] The revised trust did distinguish between the beneficiaries in one respect. It specified that if Theresa died before James, her share of the trust would lapse, whereas the provisions for Miranda and Gauvin stated that if either one of them predeceased James, her share would be distributed to her issue then living. According to Leathers, this was because James made clear that while he wanted to provide for Theresa, his priority was to ensure that everything would go to his daughters if Theresa had no need for it.

[5] In March 2014, James and Theresa both signed a deed transferring the Brea home from joint tenancy into community property with a right of survivorship. In May 2014, it was Theresa, acting as "attorney in fact" for James, who quitclaimed a property James owned in Washington into the restated trust, and attempted to do the same for the Oceanside property, both in accordance with the terms of the trust. Because the Oceanside property was improperly described in that quitclaim deed, however, the deed was ineffective and the status of the property became a contested issue in this litigation.

In January 2015, Miranda and Gauvin filed their petition challenging the validity of both the restated trust and the will executed by James in March 2014, based on the same grounds alleged in their objections to Theresa's petition. Miranda and Gauvin also filed a petition to compel Theresa to account and a petition to suspend her powers to act as trustee and to remove her as trustee.

The case was tried over 15 days in May and June of 2016. At the conclusion of Miranda and Gauvin's case in chief on their petition to invalidate the 2014 will and restated trust, Theresa moved for judgment in her favor pursuant to Code of Civil Procedure section 631.8. She argued the evidence was insufficient to sustain a judgment in their favor based on either lack of capacity or undue influence. The court granted the motion with respect to the claim of lack of capacity, but denied it with respect to undue influence. The trial then continued with Theresa's defense to the undue influence claim.

After the close of evidence, the court allowed the parties to submit closing briefs, and then took the matter under submission. On August 8, the court issued its tentative ruling. It found that the 2014 restated trust and will were invalid, based on *both* James's lack of capacity and Theresa's exercise of undue influence.

The court's ruling included an extensive discussion of the evidence, and relied heavily on the opinions of both James's neurosurgeon and Miranda and Gauvin's expert witness, to the effect that James lacked capacity to understand any of the documents he signed in early 2014, including the restated trust, the will, the powers of attorney, the deed, and the IRA account designations.

In its ruling, the trial court found "[t]here was a rush by Theresa to get estate documents in order before [Miranda and Gauvin] came back to town in March," and concluded it was "not credible that James initiated the topic of a new trust and will or transfers of his real property in March 2014." Moreover, the court concluded "that T[h]eresa acted on her influence over her now mentally and physically weak husband

over whom she had physical control over his residential care and finances in order to persuade him to provide for her on his death. . . . It is significant to the Court that there was no independent review and evaluation of James in conjunction with his execution of the trust and will."

On the other hand, the court rejected the suggestion that Theresa had acted in bad faith, observing that "[t]here is no credible evidence that T[h]eresa's actions were primarily motivated by malice. She was his wife and the day to day responsibility was hers and she appears to have acted as a caring wife throughout this final illness." The court expressly acknowledged that "[James] may well have said he wanted to take care of T[h]eresa and probably did."

The court then set a hearing "to determine the impact [of its ruling] on the balance of the Petitions including the First Accounting." At that hearing, Theresa's counsel pointed out that the court's determination that James lacked capacity was inconsistent with its mid-trial grant of her section 631.8 motion on the issue of testamentary capacity. The court explained that it was "reconsidering the 631.8" and making a finding that "[James] did not have sufficient testamentary capacity as set forth in the claims herein." As the court explained "[w]e had the case of a person who had minimal testamentary capacity but not the capacity to understand and to enter into the trust documents, the various other testamentary changes that, in effect, were testamentary changes." The court noted "the basis for that finding is set forth in the court's statement of intended decision of August 8th."

Theresa's counsel responded that the court's change of ruling on the section 631.8 motion was prejudicial to his client because "I proceeded with my defense through my case without addressing the testamentary capacity issue. There is other evidence that I would have presented but for having prevailed on that with the 631.8." Consequently, he asked the court to vacate its findings and suggested a new trial was appropriate. The court responded, "[w]ell, the alternative is the court simply does not

vacate that, the ruling, [and] that intended decision stands on undue influence." The court went on: "Since, as I understand the law, you can have a situation where there's testamentary capacity but the person lacks the mental capacity to resist the undue influence. [¶] . . . [¶] . . . that, I think, may be the better approach." The court then concluded "I will not vacate the testamentary capacity."

The court directed Miranda and Gavin's counsel to prepare the final statement of decision, and that document repeated the evidentiary analysis and findings included in the court's tentative ruling. However, whereas the tentative decision concluded the will and restated trust were invalid because James "lacked the necessary capacity and [the documents] were the result of undue influence," the final statement of decision stated those documents were invalid because James "had diminished capacity and [the documents] were the result of undue influence."

## DISCUSSION

1. *Motion to Dismiss*

Before we address the merits of this appeal, we must resolve Miranda and Gauvin's motion to dismiss the appeal based on the appellate disentitlement doctrine. Miranda and Gauvin contend that dismissal of this appeal is warranted based on: (1) Theresa's violation of the trial court's April 6, 2016, order precluding her from paying any attorney fees out of trust assets and from disbursing or transferring any trust assets; and (2) her failure to comply with the provision of the judgment requiring her "to account for her acts as Attorney in Fact from December 27, 2013 up to and including August 10, 2014 and shall file an Account and Report . . . , with corresponding bank statements, no later than thirty (30) days after the Court makes this Judgment."

The appellate disentitlement doctrine reflects the appellate court's power to dismiss the appeal of a litigant who is willfully disobeying or thwarting the trial court's orders. "An appellate court has the inherent power, under the 'disentitlement doctrine,'

to dismiss an appeal by a party that refuses to comply with a lower court order. [Citations.] As the Supreme Court observed in *MacPherson v. MacPherson* [(1939)] 13 Cal.2d [271,] 277, 'A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state.'" (*Stoltenberg v. Ampton Investments, Inc.* (2013) 215 Cal.App.4th 1225, 1229-1230 (*Stoltenberg*).)

"No formal judgment of contempt is required; an appellate court 'may dismiss an appeal where there has been *willful disobedience or obstructive tactics*. [Citation.]' [Citation.] The doctrine 'is based upon fundamental equity and is not to be frustrated by technicalities.'" (*Id.* at p. 1230.)

The appellate disentitlement doctrine is not intended to operate as punishment of a recalcitrant litigant. Rather, it is intended as "an exercise of a state court's inherent power to use its processes *to induce compliance* with a supplemental order reasonably issued in aid of execution'" (*Stone v. Bach* (1978) 80 Cal.App.3d 442, 446, italics added.) The same point was made more recently by this court in *Blumberg v. Minthorne* (2015) 233 Cal.App.4th 1384.

The result of the doctrine's application may be to stay pending proof of compliance, rather than dismiss an appeal (*Stone, supra*, 80 Cal.App.3d 442, 444 (*Stone*). It would not be applicable to a litigant who is complying, no matter how reluctantly, with the lower court's orders. "'The rationale upon which [appellate] relief is denied is that it would be a flagrant abuse of the principles of equity and of the due administration of justice to consider the demands of a party who becomes a voluntary actor before a court and seeks its aid *while he stands in contempt of its legal orders and processes*.'" (*Ibid.*, italics added.)

As illustrated by *Stone*, the appellate disentitlement doctrine is properly invoked only after the lower court's efforts to obtain compliance with its orders have been thwarted. In that case, involving a partnership dissolution and accounting, the trial

court twice made explicit findings that Bach was in contempt of its orders requiring him to turn over partnership funds and to comply with his obligation to submit to a judgment debtor examination. The lower court specifically found he had violated one of those orders 13 times and had never complied with it. (*Stone, supra*, 80 Cal.App.3d at p. 443.)

Similarly, in *Stoltenburg, supra*, 215 Cal.App.4th 1225, the defendants refused to comply with a series of lower court orders even after the lower court formally rejected their arguments, warned them their failure to comply within 10 days might result in contempt, and subsequently ruled that they were in contempt. (*Id.* at p. 1228.) Those defendants continued to ignore the lower court's repeated orders.

The facts here are markedly different. Miranda and Gauvin allege Theresa violated the trial court's prohibition against using trust funds for her attorney fees when she transferred funds from an IRA account to pay for attorney fees in May and June of 2016. They do not contend the trial court itself ever reached that same conclusion or that it actually ordered Theresa to remedy that violation in some fashion during the pendency of this appeal. Significantly, Theresa disputes that her actions actually violated the court's order,[6] and in light of the trial court's explicit finding in its statement of decision that Theresa did not act in bad faith, we will not infer that conclusion.

And with respect to Theresa's alleged violation of the judgment's requirement that she produce an accounting within 30 days, the motion to dismiss itself reveals that Theresa ultimately produced the accounting ordered by the court prior to the final deadline. Although Miranda and Gauvin contend in their motion that the accounting remained insufficient, the trial court itself had not weighed in on the point as of the time

---

[6] Theresa counters that her withdrawals did not violate the court's order because the IRA in question was not a trust asset at the time she withdrew the funds as she had long since rolled over her supposed share into a newly established IRA account in her own name, and it was from that personal account that she withdrew the funds for attorney fees.

the motion was filed. Thus, we cannot conclude that the trial court was dissatisfied with the accounting, let alone that it viewed Theresa's effort as so lacking that it amounts to a willful defiance of the court's order.[7]

Given the significant factual detail contained in Miranda and Gauvin's motion to dismiss, it appears they are asking this court to rule, in the first instance, that Theresa's overall course of conduct supports the inference that she has repeatedly exceeded her authority in her expenditures of trust funds, that she has intentionally thwarted the trial court's rulings since before trial, and that her misconduct is willful and ongoing. It is for the trial court to determine those issues, and in the absence of a clear showing that the trial court itself has reached those conclusions, we decline to apply the appellate disentitlement doctrine.[8]

The motion to dismiss therefore is denied.

2. *The Determination of Undue Influence*

Theresa next complains that the trial court erred in its determination that she induced James to sign the 2014 will and restated trust through undue influence.

---

[7] Theresa explains that her delay was initially occasioned by the fact she moved for a new trial, which was denied by the trial court on March 29, 2017. Later, in response to the court's inquiry as to why the accounting had not been filed, Theresa's counsel claimed Theresa lacked the funds to hire a professional to prepare the accounting. He suggested the trust be ordered to pay for the accounting. The court rejected that suggestion, but also raised other questions about the enforceability of the judgment during pendency of an appeal.

Ultimately, Theresa did file the accounting by the court's September 15 deadline.

[8] Because we conclude that Miranda and Gauvin's extensive evidentiary showing, even if accurate, does not merit application of the appellate disentitlement doctrine, we need not address the myriad of objections Theresa has interposed to their evidence.

"As a general proposition, California law allows a testator to dispose of property as he or she sees fit without regard to whether the dispositions specified are appropriate or fair." (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 604.) However, "[t]his presumption can be overcome if it is shown that the testator was affected by undue influence, a concept with a very definite meaning." (*Ibid*.)

Given the presumption favoring the testator's disposition of property, proving undue influence is difficult. "Illustrative expressions of the courts demonstrate the stringency with which they protect the testamentary disposition against the attack of undue influence. Thus such influence must 'destroy the testator's free agency and substitute for his own another person's will.' [Citation.] 'Evidence must be produced that pressure was brought to bear directly upon the testamentary act . . . . [The influence] must amount to *coercion* destroying free agency on the part of the testator.' [Citations.] '[The] circumstances must be *inconsistent* with voluntary action on the part of the testator' [citation]; and '[the] mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient.'" (E*state of Fritschi* (1963) 60 Cal.2d 367, 373-374; *Rice v. Clark* (2002) 28 Cal.4th 89, 96.)

With these principles in mind, we turn to Theresa's specific contentions. She first contends the trial court erred by relying on the presumption of undue influence set forth in Probate Code section 21380, subdivision (a) (section 21380(a)), in its statement of decision. "Section 21380 [applies to] donative transfers to broad categories of persons who, because of their relationship with the settlor/trustor, might exercise undue influence. Undue influence is presumed where the donative transfer is in favor of the person who drafted the instrument or where the person who transcribed it or caused it to be transcribed had a fiduciary relationship with the settlor/trustor." (*Butler v. LeBouef* (2016) 248 Cal.App.4th 198, 208.)

The presumption created by section 21380(a) affects the burden of proof, and once established, shifts the burden to the party seeking to enforce the instrument to rebut that inference by clear and convincing evidence. (§ 21380, subd. (b).)

As Theresa points out, that statutory presumption has no application to donative transfers made to a spouse, and thus cannot be relied upon to invalidate James's transfers to her. (Prob. Code § 21382, subd. (a) [specifying section 21380(a) does not apply to "a donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor"].)

Miranda and Gauvin respond by claiming Theresa waived any argument that section 21380(a) does not apply here by failing to timely make that argument in the trial court.[9] We cannot agree. While it is true that "'as a general rule issues not raised in the trial court cannot be raised for the first time on appeal'" (*Jones v. Wagner* (2001) 90 Cal.App.4th 466, 481), an exception exists if the claim presents a pure issue of law, involving only undisputed facts. (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 922; *Adelson v. Hertz Rent-A-Car* (1982) 133 Cal.App.3d 221, 225-226 [it is only where "'the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial [that] the opposing party should not be required to defend against it on appeal'"].)

The exception applies in this case, as there is no dispute that James and Theresa were married when James executed the 2014 will and restated trust, and continued to be married until his death. In light of that undisputed marital relationship, we agree with Theresa that the presumption of undue influence established by section 21380(a) is inapplicable.

---

[9] Theresa attempted to raise the issue in an untimely objection to the final statement of decision, which the court rejected.

But having agreed with Theresa's legal point, we disagree with her interpretation of the trial court's reasoning. While it is true that the trial court's final Statement of Decision—which was drafted by Miranda and Gauvin's counsel—makes brief reference to section 21380(a), the court's own tentative decision did not. Instead, while the court's tentative decision does reflect it shifted the burden to Theresa to rebut a claim of undue influence—noting specifically that "there is not sufficient credible evidence to find that [James's] addition of T[h]eresa as a beneficiary *was* . . . not the result of T[h]eresa's influence"—it does not specify how the court justified that shift. Based on the court's explicit reference to "an undue benefit analysis," we conclude the court properly applied the *common law* presumption of undue influence in its tentative decision, rather than the statutory one.

The common law rule is that "'a presumption of undue influence, shifting the burden of proof, arises upon the challenger's showing that (1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument.'" (*Bernard v. Foley* (2006) 39 Cal.4th 794, 800.) While there is some intentional overlap between section 21380(a) and the common law presumption, the two presumptions operate somewhat differently.

Section 21380(a) is primarily intended to apply to those whose profession may give them heightened access to persons who are especially susceptible to undue influence. (See, *Rice v. Clark* (2002) 28 Cal.4th 89, 97 [explaining that former Probate

Code section 21350, the predecessor to section 21380,[10] was enacted "in response to reports that an Orange County attorney who represented a large number of Leisure World residents had drafted numerous wills and trusts under which he was a major or exclusive beneficiary, and had abused his position as trustee or conservator in many cases to benefit himself or his law partners. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 21 (1993–1994 Reg. Sess.) as amended Feb. 4, 1993, p. 1.)"].)

In contrast to the common law rule, which includes the element of "undue benefit," section 21380 looks only at (1) the circumstances under which the donative instrument was created—i.e., whether the recipient drafted the instrument, and (2) the relationship between the donor and the recipient—i.e. whether the recipient is a fiduciary or care custodian of the donor. If those conditions are met, the presumption will apply without regard to whether other factors suggest that gift is reasonable or justified in light of the parties' relationship. In other words, the statutory test ignores the "undue benefit" factor of the common law test.

Here, as we have noted, the trial court's own tentative decision expressly states it is "[u]sing an undue benefit analysis." It then makes an explicit finding that James's 2014 and restated trust conferred "an undue benefit by virtue of giving a third [of James's estate] to T[h]eresa even though she was his wife." That finding, which is also incorporated into the court's final statement of decision, reflects an application of the common law undue influence presumption, rather than the statutory one. Consequently,

---

[10] "In 2010, Probate Code former section 21350 et seq. was repealed, effective January 1, 2014. (Prob. Code, former § 21355, subd. (b); Stats. 2010, ch. 620, § 6.) At the same time, Probate Code section 21380 et seq. was enacted, effective January 1, 2011. (Stats. 2010, ch. 620, § 7.)" (*Jenkins v Teegarden* (2014) 230 Cal.App.4th 1128, 1136.) In doing so, the Legislature "reenact[ed] Probate Code section 21350 et seq. as Probate Code section 21380 et seq." *(Id*. at p. 1138.)

we infer the citation to section 21380(a) in the final statement of decision was the product of mistake.

3. *Sufficiency of the Evidence to Support Common Law Presumption*

Anticipating the possibility that the court intended to apply the common law undue influence presumption, Theresa next contends the evidence was insufficient to support that presumption. We agree.

In reviewing a challenge to the sufficiency of the evidence, "[w]e presume the evidence supports every finding of fact unless appellant demonstrates otherwise, and we must draw all reasonable inferences from the record to support the judgment." (*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1357.) Thus, "we are bound by the familiar principle that 'the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100.)

However, even applying that rigorous standard, we must conclude the evidence is insufficient to support a finding that Theresa "'actively participated in procuring the . . . preparation or execution [of the 2014 will and restated trust]'" (*Bernard v. Foley, supra* 39 Cal.4th at p. 800), and thus that the trial court erred by applying the common law presumption of undue influence against her.

As explained in *Estate of Mann* (1986) 184 Cal.App.3d 593, the "active participation" element of the common law presumption does not include merely finding an attorney to assist the decedent in preparing estate documents. "'[T]he mere fact of the beneficiary procuring an attorney to prepare the will is not sufficient "activity" to bring the presumption into play'" nor is her "'selection of attorney and accompanying testator to his office,'" or her "'mere presence in the attorney's outer office; . . . or presence at the execution of the will . . . ; or presence during the giving of instructions for the will and at

its execution . . .'" (*Id.* at p. 608.) Instead, there must be evidence that the beneficiary personally drafted the instrument or induced the decedent to sign it, or otherwise directly pressured the decedent into agreeing to a particular disposition.

In this case, there was no evidence that Theresa personally participated in the procurement of James's 2014 will and restated trust, beyond arranging for Leathers, the probate attorney, to assist him in that endeavor. As described by Leathers, the process of discerning James's testamentary wishes and drafting the documents necessary to carry out those wishes excluded Theresa entirely. Instead, that process allowed James to express his wishes to Leathers without the input of any third parties, including Theresa.

Although the trial court was free to disbelieve Leathers' testimony, that "[d]isbelief does not create affirmative evidence to the contrary of that which is discarded." (*Estate of Bould* (1955) 135 Cal.App.2d 260, 264.) Because our record contains no evidence that Theresa actively participated in the procurement of the 2014 will and restated trust, we conclude the evidence was insufficient to support the common law presumption of undue influence. Thus the court erred when it shifted the burden of proof to Theresa to demonstrate those documents "[were] not the result of [her undue] influence"

We conclude the error warrants a reversal of the judgment because it is reasonably probable that a more favorable decision would have resulted in the absence of the error. (*Thomas v. Lusk* (1994) 27 Cal.App.4th 1709 [applying standard to trial court's erroneous shifting of the burden of proof].) Although Miranda and Gauvin claim they offered sufficient evidence to support a finding of undue influence, even without the aid of any presumption, that evidence was undermined by other findings the trial court made.

For example, Miranda and Gauvin suggest the "haste" and "secrecy" with which Theresa orchestrated the changes in James's estate plan, combined with the significant changes he made in his personal property rights, and Theresa's ability to control the necessaries of James's life, are sufficient to evidence her undue influence over

him. (See Welf. and Inst. Code, § 15610.70, defining undue influence.) But the trial court's explicit finding that Theresa acted in good faith precludes us from inferring any sort of consciousness of guilt from the speed or secrecy with which she acted. Given James's terminal condition and declining mental acuity, it would be surprising if Theresa did not act as quickly as possible to ensure he was able to put his affairs in order. Theresa engaged a professional probate attorney, who met with James several times at the assisted living facility where he was residing. The fact that she did so without including his daughters in the process is consistent with Leathers' goal of ensuring that James would be able to make his dispositions without being subjected to any outside influence from any source.

We can draw no adverse inference from the fact James had made significant changes in his personal property rights because the trial court made explicit findings in Theresa's favor on those issues. The court found not only that James wanted Theresa to take charge of his day-to-day finances and to have access to his accounts to ensure his care was paid for out of his funds rather than hers, but also that he had sufficient mental capacity to make that decision.

The claim that Theresa had the ability to control his necessities of life is questionable because James was residing in a residential care facility where professionals provided for his day-to-day needs. And even if we assume Theresa did have that ability, there is no evidence she ever sought to use it as a means of pressuring James into doing anything. Again, "'[the] mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient.'" (*Estate of Welch* (1954) 43 Cal.2d 173, 175.)

Finally, the trial court's finding of undue influence is undermined by its finding that James "probably did" want to take care of Theresa after his death. That finding suggests that James's disposition of his assets was consistent with his own wishes, and not the result of Theresa overcoming his free will.

In light of the foregoing, we conclude the trial court's erroneous shifting of the burden of proof to Theresa was prejudicial and warrants a new trial on the issue of undue influence.

4. *New Trial on Lack of Capacity*

As we have already discussed, our record suggests that by the end of trial, the court had concluded James lacked sufficient capacity to understand many of the documents prepared for him by Leathers—even if he retained bare testamentary capacity.

The trial court made that finding in its tentative decision, and the evidentiary analysis set forth in that decision suggests that the court's final ruling to invalidate James's 2014 will and restated trust was largely based on that finding. But when Theresa's counsel pointed out to the court that its tentative was inconsistent with its mid-trial ruling on her Code of Civil Procedure section 631.8 motion, the court stated it was "reconsidering the 631.8" and making a finding that "[James] did not have sufficient testamentary capacity as set forth in the claims herein."

The court then explained it was drawing the distinction between bare testamentary capacity and the capacity to understand more sophisticated financial instruments: "[w]e had the case of a person who had minimal testamentary capacity but not the capacity to understand and to enter into the trust documents, the various other testamentary changes that, in effect, were testamentary changes." The court's distinction reflects a proper application of the law. (*Anderson v. Hunt* (2011) 196 Cal.App.4th 722.)

However, when confronted with the argument that its post-trial reconsideration of the issue of James's mental capacity issue effectively deprived Theresa of the ability to offer a defense on the point—and thus the reality that a new trial on the issue should be had—the court chose instead to withdraw its tentative finding, apparently believing its decision to invalidate the revised trust would survive on the basis of undue influence alone. Nothing in the court's ruling suggests it no longer believed that James

lacked sufficient capacity to execute at least some of the estate planning and other documents he signed in March 2014. To the contrary, the record suggests the court's opinion on that issue was unchanged.

Our ruling requires that the undue influence issue be retried. In light of that fact, we conclude justice requires that the issue of James's lack of capacity must also be retried.

*5. Other Issues*

Theresa advances other arguments on appeal, but because we are reversing the judgment and remanding the case for a new trial, they are largely moot. She contends the trial court's judgment was overly broad because it declared invalid nine documents other than the 2014 will and restated trust, when Miranda and Gauvin's petition challenged only the will and restated trust. We note that all of those documents were executed at or around the same time, and several were created specifically to implement the provisions of the will and trust. However, as Theresa points out, some of those documents were intended to give her authority to manage James's finances while he was residing at the assisted living home, and the trial court specifically concluded those were decisions James both wanted and had the capacity to make. Those issues and apparent conflicts will have to be sorted out on retrial.

Theresa also challenges the award of $500,000 in attorney fees made in favor of Miranda and Gauvin. Given our reversal of the judgment, that award becomes moot and we reverse it. However, in anticipation of a retrial, we comment briefly on the merits of that fee award.

As Theresa points out, Miranda and Gauvin sought fees on the basis of Probate Code sections 21380, subdivision (d), and 15642, subdivision (c). The first of those provisions allows for an award of fees to the party who successfully challenges a donative transfer described in section 21380(a). As we have already explained,

section 21380(a) does not apply to donative transfers made to spouses or other close family members, and thus Miranda and Gauvin cannot recover fees pursuant to that provision.

Probate Code section 15642, subdivision (c), is similarly inapplicable because it also ultimately rests on the applicability of section 21380(a). Probate Code section 15642 governs petitions for removal of a trustee, and subdivision (c) of the statute specifies that "[i]f, pursuant to paragraph (6) of subdivision (b), the court finds that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud or undue influence, the person being removed as trustee shall bear all costs of the proceeding, including reasonable attorney's fees." Paragraph (6) of subdivision (b) states, in turn, that it applies only to "a person described in subdivision (a) of Section 21350 or subdivision (a) of section 21380." And because Probate Code section 21350 was repealed in 2014 (Stats. 2010, ch. 620, § 6), Probate Code section 15642, subdivision (c), applies only when the trustee being removed is a person described in section 21380(a).

As we have already explained, Theresa is not such a person.

Finally, Theresa challenges the trial court's award of costs to Miranda and Gauvin, arguing that pursuant to Code of Civil Procedure section 1032, such an award is appropriate only when expressly provided for in the judgment itself. Our reversal of the judgment makes the point effectively moot because the costs award falls along with the judgment. We trust the issue will be addressed on remand.

## DISPOSITION

The judgment is reversed, and the case is remanded to the trial court for a new trial. The parties are to bear their own costs on appeal.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.